Nos. 79-1538, 80-231 & 79-1596

In the
Supreme Court of the United States

OCTOBER TERM 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Appellant,

v.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, THE COMMONWEALTH OF VIRGINIA, AND THE TOWN OF WISE, VIRGINIA,
Appellees.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Appellant,

v.

STATE OF INDIANA, INDIANA COAL ASSOCIATION, MEADOWLARK FARMS, INC., AMAX COAL COMPANY, PEABODY COAL COMPANY, AND JOHN A. CONLON,
Appellees.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, THE COMMONWEALTH OF VIRGINIA, AND THE TOWN OF WISE, VIRGINIA,
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CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Appellee.

AMICUS CURIAE BRIEF IN SUPPORT OF THE VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, et al., AND THE STATE OF INDIANA, et al.

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AMICUS CURIAE BRIEF IN SUPPORT OF THE VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, et al., AND THE STATE OF INDIANA, et al.

Amicus curiae Mountain States legal Foundation respectfully submits the following views regarding *Andrus v. Virginia Surface Mining and Reclamation Association,* No. 79-1538; *Andrus v. State of Indiana,* No. 80-231; and *Virginia Surface Mining and Reclamation Association v. Andrus,* No. 79-1596. These cases were not consolidated for Supreme Court consideration, but are being considered in

tandem. The issues are sufficiently similar to permit the *amicus* to present arguments regarding these cases simultaneously.

INTEREST OF THE AMICUS

Mountain States Legal Foundation is a non-profit public interest law center, dedicated to bringing before the courts those issues vital to the individual rights and freedoms protected by the United States Constitution and the nation's legal traditions. The Foundation, which is supported entirely by the donations of its members, is deeply concerned with preservation of political accountability and citizen input into governmental decisionmaking. As *amicus curiae,* the Foundation presents to this Court various public policy reasons supporting a balance of powers between national and state governments.

Mountain States Legal Foundation has received written consent from all parties to file this brief as *amicus curiae*. Copies of these letters have been filed with the Clerk of the Court.

SUMMARY OF THE ARGUMENT

In various provisions of the Surface Mining Act, Congress has usurped state government functions and exceeded the commerce power. This overreaching by the national government is only one instance of a continuing trend toward centralized decisionmaking that threatens to destroy the federal structure of government in America.

In deciding the *Surface Mining* cases, the Court should be informed of the potentially far-reaching implications of defining the boundaries of congressional regulation. To illuminate these matters for the Court, the *amicus* has examined the policy reasons for reserving meaningful functions for the states. Political accountability and public input are facilitated by clear divisions of authority, yet "cooperative federalism" destructively confuses the lines of respon-

sibility. Flexibility, experimentation and consideration of local factors are more readily accomplished through state and local level decisionmaking. The dangers of power concentrated in the hands of a few are best controlled by retaining a true division of power between the national and state levels.

These policy factors underlie the Constitutional Convention's choice of a federal system, and analysis of the Surface Mining Act shows that it fails to comply with the standards of federalism embodied in the Constitution. In particular, the regulation of land use falls outside the commerce power and, alternatively, is a traditional function reserved to the states under the tenth amendment.

The Act also unconstitutionally deprives mine operators of their due process rights by requiring prepayment of penalties prior to final determination of the validity and amount of the penalty. This prepayment effectively deprives operators of essential funds, thus potentially threatening the economic viability of mining concerns.

ARGUMENT

I. FOR CONSTITUTIONAL AND POLICY REASONS, INDEPENDENT STATE DECISIONMAKING MUST BE PRESERVED.

This Court's decisions in the *Surface Mining* cases will greatly influence the future of American government. These rulings will foretell either a gradual abandonment of federalism or a return to the separation of powers anticipated by the Constitution.

The nature of national/state relations has changed rapidly in the last few decades. The device known as "cooperative federalism" increasingly appears to be a scheme of national decisionmaking that endangers the federal structure of American government. The states are rapidly becoming departments of the national government whose

elected legislatures and executives must take orders from Congress and federal administrators. Today, fully *one-quarter* to *one-third* of an average state's budget is made up of federal funds. National Conference of State Legislators, State Legislative Oversight of Federal Funds: Preliminary Report and Suggested Activities 9 (1979). In 1950, federal grants of $2 billion comprised only 10.4 percent of total state and local expenditures. Fiscal year 1979 estimated federal outlays to states had risen to an astounding $85 billion. Executive Office of the President, Special Analysis of the Budget, Fiscal Year 1979, at 1984 (1978).*

If the federal form of government is to remain viable, the judiciary must delineate the boundaries of national and state powers. The Founding Fathers, and the courts until the New Deal, recognized the importance of state sovereignty. *See, e.g., Coyle v. Smith,* 221 U.S. 559 (1911); *United States v. Butler,* 297 U.S. 1 (1936). However, a drastic shift in judicial philosophy devastated the role of states in the federal system. *See, e.g., Steward Machine Co. v. Davis,* 301 U.S. 548 (1937); *United States v. Darby,* 312 U.S. 100 (1941).

National League of Cities v. Usery, 426 U.S. 833 (1976), was a first step in establishing guidelines for preserving state autonomy. Although *National League of Cities* marked a reawakening of state sovereignty principles, it did not provide a clear test for determining when the national government has overstepped the bounds of its

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*Federal grants to states have grown at a consistently higher rate than overall federal expenditures. From 1967 to 1977, the average annual increase in grants was 16.2 percent while total federal outlays grew by 9.8 percent each year. Office of Management and Budget, Budget of the United States Government, Fiscal Year 1979, at 175 (1978). This growing dependence on federal funding has resulted in serious distortions of state spending priorities and management structures. Posner & Sorett, *A Crisis in the Fiscal Commons: The Impact of Federal Expenditures on State and Local Governments,* 10 Public Contract L.J. 341 (1978).

enumerated powers. Such a clear test is absolutely necessary to insure a continuation of autonomous state decision-making.

Instead of detailing the past history of state sovereignty and why the Constitution demands independent state decisionmaking — arguments that are adequately addressed in the other briefs submitted in this litigation — the *amicus* will emphasize the reasons that the national/state balance of power is desirable and functional in modern America. The *amicus* will present the legal, political, and philosophical reasons for strengthening state autonomy.

A. *National decisions disguised as state decisions obscure the lines of political accountability.*

The reality of "cooperative federalism" is that it creates numerous programs that are neither fully state programs nor fully national programs. Certain aspects of a program might be primarily state functions while some are primarily national, but the bulk of cooperative programs are a confusing mix of authority. The challenged provisions of the Surface Mining Act, for example, compel state legislation to be enacted "in accordance with the requirements of this Act." Section 503(a)(1), 30 U.S.C. § 125(a) (Supp. I 1977). Refusal to follow the demands of the Act or the Secretary's regulations results in usurpation of the state's role by a federal program. Section 504(a), 30 U.S.C. § 125(a)(Supp. I 1977).

This regulatory structure entirely distorts the usual lines of political accountability. For example, once a program is enacted, dissatisfied citizens have no clear recourse. State governments cannot alter programs because they are subject to continuing national commands, and federal agencies cannot unilaterally alter the state programs. Change is consequently more difficult because neither governmental entity alone is able to amend or abolish an unsatisfactory program. Thus, a representative form of government, re-

liant upon citizen input, erodes into an unresponsive and confusing labyrinth that is far removed from the fundamental principles of our constitutional system. *See Stromberg v. California,* 283 U.S. 359, 369 (1951); *United Mine Workers District 12 v. Illinois State Bar Association,* 389 U.S. 217 (1967).

B. *State-level decisionmaking allows more citizen input and more consideration of local factors.*

States long functioned as the governmental units most directly affecting the lives of individuals. As American life has become more complex and as population has increased, individual control over, and input into, the governing process has naturally decreased. However, this inevitable lessening of an individual's potential impact has been unduly accentuated by the increasing amount of regulation and by the centralization of decisionmaking. It is not surprising that public participation in the electoral process has gradually declined as individual efforts to influence the government have become more futile.

Furthermore, the removal of decisionmaking from the hands of state-level legislators and administrators to those on the national level must necessarily decrease the attention to local circumstances and local problems. An administrator who must plan for the entire country cannot easily tailor a plan to community needs.

The issues addressed by the Surface Mining Act require a careful balancing of social, economic and environmental factors. Such a balancing process can be most accurately undertaken by those familiar with local problems.

C. *State/national separation of powers is a valuable safeguard against dangerous accumulations of power.*

The Constitution is an instrument carefully designed to protect individual freedom by pitting the branches of government against each other. *See Buckley v. Valeo,* 424

U. S. 1, 120-23 (1976). The separation of powers between the national and state governments is as essential to the American structure of government as the separation between the three branches of the national government. The purpose behind both types of separation was the same: to protect against the tyranny that could arise from the accumulation of all powers in the same hands. The twofold protection envisioned by the authors of the Constitution was explained by Madison in The Federalist No. 51:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion alloted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

The reluctance with which power was given to the national government is shown by this Court's observation in *South Carolina v. United States,* 199 U.S. 437, 456 (1905):

> The opposition to the Constitution came not from any apprehension of danger from the extent of power reserved to the states, but, on the other hand, entirely through fear of what might result from the exercise of the powers granted to the central government.

The fact that Americans have become accustomed to a massive, centralized government does not diminish the wisdom of the early patriots' concern. During this Court's current opportunity to reevaluate federal principles, the words of Justice Frankfurter, concurring in *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 594 (1952), may prove to be a valuable reminder:

> The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions

that fence in even the most disinterested assertion of authority.

D. *States serve an important role as laboratories for social and environmental experimentation.*

A crucial reason for preserving independent state decisionmaking is to encourage the states to explore new approaches to governmental problems. As noted by Justice Brandeis in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (dissenting opinion):

> It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

See also Connecticut Light and Power Co. v. FPC, 324 U.S. 515, 530 (1945). Independent innovation is particularly necessary in the case of new government regulatory activities, such as environmental regulation, because state experimentation can hasten the development of successful regulatory techniques. Furthermore, since long-term impacts of environmental regulation may not be readily apparent, experimentation on a local level may avert major adverse effects. The Surface Mining Act and the accompanying regulations contain numerous requirements that are highly technical and very detailed. Little latitude is provided for state flexibility, and state experimentation is discouraged. In evaluating the constitutionality of the Act, the Court should consider the desirable public policy of allowing state innovation.

E. *Control of land use and of mining is a traditional state function outside the scope of the commerce power.*

Although the decisions of the lower courts in the two *Surface Mining* cases both found that provisions of the Surface Mining Act exceeded congressional authority, the

courts diverged on the rationale used to support a finding of unconstitutionality. The Indiana district court found that land use planning was an activity outside the scope of interstate commerce, and thus regulation of the activity exceeded the enumerated powers of Congress. Jurisdictional Statement at 8a-19a, *Andrus v. State of Indiana,* No. 80-231. The Virginia court found that coal mining was excluded from national government regulation under the rationale of *National League of Cities, supra.* Jurisdictional Statement at 18a, *Andrus v. Virginia Surface Mining and Reclamation Association,* Nos. 79-1538 and 79-1596.

The amicus believes that the Indiana court's rationale is more accurate, and thus argues that land use control is beyond the regulatory power of Congress because it is outside the scope of interstate commerce.

The definition of interstate commerce has been greatly expanded by this Court since the New Deal. For example, before such expansive cases as *Wickard v. Filburn,* 317 U.S. 111 (1942), and *Katzenbach v. McClung,* 379 U.S. 294 (1964), this Court held that mining was not interstate commerce. *Carter v. Carter Coal Co.,* 298 U.S. 238 (1936); *Oliver Iron Mining Co. v. Lord,* 262 U.S. 172 (1923); *Hammer v. Dagenhart,* 247 U.S. 251, 272 (1918) ("The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped, or used in interstate commerce, make their production a part thereof.") Now, however, federal regulation of mining has become commonplace.

An overly broad definition of commerce has a strong impact on the federal system since the commerce clause has been the enumerated-power foundation for a wide variety of modern legislative action. Unfortunately, the resulting destruction of the federal system may overshadow many of the benefits achieved. The most serious usurpations of state authority should be minimized by a return to meaningful boundaries on the scope of interstate commerce.

Certainly the current conception of commerce raises the question of whether there is any remaining limit to the definition. If the grant of power to regulate commerce is to have any meaning short of power to regulate every aspect of the national economy, then this Court must find that some items are excluded from the definition of commerce. One of the clearest items for exclusion is land use regulation, as found in the Surface Mining Act. To say that something as uniquely stationary as land use may be regulated because it affects interstate commerce is to say that nothing is beyond the congressional commerce power.

Although, as noted above, the *amicus* considers the Indiana district court's analysis to be more accurate, the same conclusion of unconstitutionality is mandated by the Virginia court's analysis based on *National League of Cities, supra.* Under *National League of Cities,* a matter is excluded from the reach of congressional regulation if it interferes with an integral function of state government protected by the tenth amendment. 426 U.S. at 855.

National League of Cities does not exhaustively list activities that are "essential to separate and independent existence" of the states, 426 U.S. at 845, quoting *Lane County v. Oregon,* 74 U.S. (7 Wall.) 71, 76 (1869). Among the few activities identified are power to locate the seat of government, 426 U.S. at 845; obtaining income by taxation, *New York v. United States,* 326 U.S. 572 (1946); setting salaries for fire and police department employees, 426 U.S. at 851, 855; and (by implication from the overruling of *Maryland v. Wirtz,* 392 U.S. 183 (1968)) determining salaries for hospital and school employees.

Land use planning has traditionally been a local function, which has only recently risen even to the state level. It is a process that requires keen attention to site-specific details and community needs, and is therefore unsuited to nationwide regulation. The steep-slope provision in section

515 of the Act, 30 U.S.C. § 1265 (Supp. I 1977), the prime farmland provisions in sections 507, 508, 510, 515, and 519 of the Act, 30 U.S.C. §§ 1257, 1258, 1269, 1265, and 1269 (Supp. I 1977), and the other portions of the Act held to be unconstitutional by the district courts will seriously impede the process of local planning. These provisions displace state decisionmaking in an area that has heretofore remained one of the last bastions of state and local control.

Because land use regulation is a uniquely local function and because the Surface Mining Act would displace state decisionmaking with regard to this function, the Act should be declared unconstitutional as violating the federal structure of the Constitution.

II. BY FORCING MINE OPERATORS TO PURCHASE THEIR DUE PROCESS RIGHTS, SECTION 518(c) OF THE ACT UNCONSTITUTIONALLY CONDITIONS DUE PROCESS RIGHTS

In light of this Court's extensive discussion of the due process clause, section 518(c) of the Act must be struck down as violative of due process. Section 518(c) requires the prepayment of an assessed civil penalty as a condition of challenging the amount or validity of the penalty. 30 U.S.C. §1268(c) (Supp. I 1977). Not only are coal mine operators forced to purchase their right to contest the penalty, the present system in effect assumes guilt, not innocence, by forcing prepayment before the final determination of the amount and validity of the penalty.

As conceded in the Secretary of Interior's brief, a mine operator wishing to contest both the amount and the fact of the underlying violation *must* prepay the penalty as a condition of review. Brief of the Secretary of Interior at 68-69, *Andrus v. Virginia Surface Mining & Reclamation Association*, Nos. 79-1538 and 79-1596. This heavy burden on mine operators is allegedly justified by bureaucratic expediency in the collection of the penalty and the conten-

tion that, should a mine operator prevail on review, no financial harm is incurred due to the refund-with-interest provision of Section 518(c), 30 U.S.C. §1268(c) (Supp. I 1977). *Id.* at 70. In short, these justifications are simply inadequate to uphold this unprecedented, onerous burden on mine operators.

The desire to expedite the collection of penalties through prepayment cannot outweigh the right of mine operators to contest the amount and fact of the penalty. The purpose of the Act is not that of revenue raising. *See* section 102 of the Act, 30 U.S.C. § 1202 (Supp. I 1977). Thus, the rationale of decisions that uphold prepayment as necessary to effectuation of the government's interest in the collection of revenues is inapposite. *See, e.g., Phillips v. Commissioner,* 283 U.S. 589 (1931). Further, the contention that the prepayment is only a preliminary deprivation since the penalty is not final until the end of the review program, effectively ignores reality. Mine operators are denied the use of the funds placed in escrow. Since administrative and judicial review of the amount and fact of the penalty necessarily takes time, mine operators are completely deprived of the use of these funds for a potentially substantial period of time. As will be discussed *infra,* this deprivation of the use of these funds can have disasterous consequences. Thus, it is indeed a final, not preliminary, deprivation.

Not only is the contention that no financial harm will be incurred due to the refund-with-interest provision irrelevant, *see Stanley v. Illinois,* 405 U.S. 645, 647 (1972) ("This Court has not . . . embraced the general proposition that a wrong may done if it can be undone."), it too ignores reality. Under the Act, each violation can incur a civil penalty of up to $5,000, with each day of continuing noncompliance deemed a separate violation for assessment purposes. Section 518(a) of the Act, 30 U.S.C. § 1268(a). (Supp. I 1977). For a small mining concern with substantial monthly equipment payments and payroll commitments,

the diversion of operating funds to purchase its due process rights may well force it out of business. Even a temporary shutdown can have disasterous consequences that cannot be compensated by an eventual refund of the penalty with interest. *See Virginia Surface Mining & Reclamation Association, Inc. v. Andrus,* 483 F. Supp. 425, 444 (W.D. Va. 1980). When faced with this prospect, a mine operator is extremely susceptible to unjust coercion by the Office of Surface Mining. Allegedly improper practices may be changed solely due to the mine operator's need to maintain economic viability. This coercion, made possible by the prepayment provision, violates any notion of fundamental fairness.

Thus, since the purpose of the Act is not to raise revenue, since mine operators are potentially forced to choose between continued economic viability and the exercise of their constitutional right to due process, and since the refund-with-interest provision cannot fully compensate the mine operator if he prevails on review, fundamental fairness requires that operators be allowed to exercise their due process rights to exhaustion *before* they are forced to pay a disputed penalty.

CONCLUSION

The challenged provisions of the Surface Mining Act are outside the scope of congressional power. The Act regulates land use, which is a matter beyond the reach of the commerce power, or alternatively, a matter foreclosed from congressional action by the tenth amendment. Moreover, policy considerations militate against the centralized decisionmaking exemplified by the Surface Mining Act. Such centralization decreases public participation in government by lessening the potential impact of individual citizens and by confusing the traditional lines of political accountability. Centralization decreases government experimentation and flexibility, and it encourages the accumulation of power that the Founding Fathers sought to avoid. In its regulation of surface mining, Congress has overstepped its bounds to pursue a course which is neither constitutional nor desirable.

The Act also deprives mine operators of their procedural due process rights by requiring payment of penalties as a condition of seeking meaningful review. The prepayment provisions of the Act force operators to pay an unfairly high price for vindication of their constitutional rights.

The *amicus* respectfully urges the Court to affirm the judgments of the district courts insofar as they hold portions of Title V of the Surface Mining Act, 30 U.S.C. §§ 1251-1279 (Supp. I 1977), to be unconstitutional.

Respectfully submitted,

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